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HOMELAND SECURITY, PESTICIDE REGULATION AND COMMON HOUSEHOLD CHEMICALS: ARE WE ADEQUATELY PROTECTING *ALL* OUR SOURCES?

LETICIA M. DIAZ†

Since September 11, Americans have contemplated pest control hazards Rachel Carson never foresaw: terrorists commandeering crop duster aircraft to rain down poison upon our earth and suicide bombers mixing pesticides into their explosives. What she did warn of, however, is still true today: 'anyone may walk into a store and, without being asked, buy substances of . . . death-dealing power.'¹

I. INTRODUCTION

In the aftermath of the terrorist attacks of September 11, 2001, legislators, business owners, consumers and everyday citizens, all with a view of how to protect our interests, voiced their opinions on how to improve national security with patriotic zest.² Common-place occurrences became suspect³ and the government warned cit-

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1. Rachel Carson, 92 COUNCIL NEWS 12 (Winter 2001/2002), *available at* <http://members.aol.com/ccouncil/ourpage/cides4.htm#code> (quoting Rachel Carson's concerns of 2001 from *Silent Spring*).

2. U.S.A. Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., 22 U.S.C., 31 U.S.C., 42 U.S.C., 50 U.S.C.). The Act addresses the following: Title I, Enhancing Domestic Security against Terrorism; Title II, Enhanced Surveillance Procedures; Title III, International Money Laundering Abatement and Anti-Terrorism Financing Act of 2001; Title IV, Protecting the Border; Title V, Removing Obstacles to Investigating Terrorism; Title VI, Providing for Victims of Terrorism, Public Safety Officers, and Their Families; Title VII, Increased Information Sharing for Critical Infrastructure Protection; Title VIII, Strengthening the Criminal Laws Against Terrorism; and Title IX, Improved Intelligence. *Id.*

3. See Citizen Corps, *Programs and Partners: Neighborhood Watch Program*, at <http://www.citizencorps.gov/programs/watch.shtm> (last visited Dec. 28, 2002) [hereinafter Citizen Corps]. An expanded neighborhood watch program incorporated terrorism prevention and education into its existing crime prevention mission. *Id.*

izens to be on highest alert.⁴ But alert for what? The answer became obvious rather quickly. Americans became aware of their surroundings. Neighbors were scrutinized.⁵ Airline security was tighter than ever.⁶ The government urged citizens to watch commercial trucks with suspicion,⁷ fearing these trucks might carry hazardous chemicals to be used as weapons, or even worse, chemicals “weaponized” by terrorists.⁸ Everything out of the ordinary became suspect. But what of the ordinary? Are Americans sufficiently on alert for common everyday threats? While much emphasis has been placed on rampant regulatory measures for sophisticated products, common household items have been overlooked.⁹ CNN released a training video for select Al Qaeda recruits that showed terrorists receiving instruction on making bomb components using “easy-to-obtain” materials.¹⁰

This article addresses why it is urgent that the government include “easy-to-obtain” materials in the regulatory schemes contemplated by any new Homeland Security proposal and why our chemical industry is vulnerable.¹¹ Part II of this article presents a simple rendition of the statutory authority for the overall regulation

4. The White House, Office of the Press Secretary, *Governor Ridge Announces Homeland Security Advisory System* (Mar. 12, 2002), available at <http://www.whitehouse.gov/news/releases/2002/03/20020312-1.html>.

5. See Citizen Corps, *supra* note 4. In the aftermath of September 11, 2001, the need for strengthening and securing American communities has become even more critical. *Id.*

6. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001) (codified at 49 U.S.C. § 114) (delegating transportation security to Department of Transportation).

7. See Modern Bulk Transporter, *America's Trucking Army Reports for Duty, Drivers to Serve as Eyes and Ears for Nation* (June 1, 2002), at http://bulktransporter.com/ar/transportation_americas_trucking_army/. The American trucking industry will train a potential three million professional truck drivers to spot and report any suspicious activities that might have terrorism or national security implications. See *id.*

8. See U.S. Department of Transportation, *Safety Alert: Hazmat Transportation Community Urged to Increase Safety Measures* (Sept. 2001), at <http://hazmat.dot.gov/pubtrain/safe9-01.pdf> [hereinafter DOT Safety Alert]. The U.S. Department of Transportation recommends that additional safety precautions be taken regarding the transportation system. See *id.*

9. See Office of Pesticide Programs, EPA, *Pesticides: Topical & Chemical Factsheets*, at http://www.epa.gov/pesticides/factsheets/health_fs.htm (updated Feb. 19, 2003) (discussing general guidance on pesticide security with reference to hazardous household pesticides).

10. See Nic Robertson, *Terror on Tape: Bomb-Making Video Reveals Scope of Al Qaeda Threat*, available at <http://www.cnn.com/2002/US/08/21/terror.tape.main/> (last visited Apr. 7, 2003).

11. See *id.* (explaining Al Qaeda's use of “easy to obtain” chemicals).

of chemicals.¹² Part III addresses the applicator nexus and issues arising therein.¹³ Part IV discusses pesticide safety with respect to site security and the adequacy of existing legal avenues.¹⁴ Part V presents ways to regulate all pesticides and potentially hazardous “over-the-counter” chemicals that terrorists use to produce weapons.¹⁵ Part VI recommends that all chemicals/pesticides, including the so-called “over-the-counter”¹⁶ chemicals, be regulated and sold in a manner consistent with the goals of homeland security.¹⁷

II. REGULATORY OVERVIEW — REGULATION OF PESTICIDES AND OTHER DELETERIOUS CHEMICALS

A. History of Pesticide Control

The Federal Insecticide Act of 1910¹⁸ was the catalyst for the regulatory process of pesticide control.¹⁹ The Act was deficient be-

12. For a discussion of the regulatory scheme, see *infra* notes 19-46 and accompanying text.

13. See *infra* notes 47-57 and accompanying text. See also Phil Zahodiakin, *Applicators are Strongest and Weakest Link Against Terrorists*, 30 PESTICIDE & TOXIC CHEM. NEWS 14 (Dec. 17, 2001) (explaining need for increased regulation of access to pesticides).

14. For a discussion of pesticide safety, see *infra* notes 58-121 and accompanying text.

15. For a discussion of regulatory proposals, see *infra* notes 122-133 and accompanying text.

16. The term “chemicals/pesticides” refers to those chemicals or pesticides which can be purchased without a license or any official document at local retail outlets, such as The Home Depot. See 40 C.F.R. § 152.160 (May 4, 1998) (explaining that EPA does not normally classify products for general use and products that are not restricted remain unclassified).

17. See *infra* notes 134-142 and accompanying text. See also The White House, *Frequently Asked Questions*, at <http://www.whitehouse.gov/response/faq-homeland.html> (last visited Apr. 7, 2003) (stating focus of Office of Homeland Security includes detection, preparedness, prevention, protection, response and recovery and incident management).

18. The Federal Insecticide Act of 1910, ch. 191, 36 Stat. 331 (1910) (repealed 1947). This law made it unlawful to “manufacture . . . any insecticide . . . which is adulterated or misbranded.” *Id.* The Department of Agriculture was charged with examining various products to determine whether they violated the Act. *Id.* at 332. The Act was concerned with a product’s correct and accurate labeling as to exact ingredients (*i.e.*, if water is added to Lead Arsenate, one of the products the Act addressed, “the percentage of extra water [must be] plainly and correctly stated on the label”). *Id.* at 333. The Act also prohibited false or misleading ingredients or substances and “all insecticides . . . or fungicides which are falsely branded as to the State, Territory or Country in which they are manufactured or produced.” *Id.* The only reference to health effects of pesticides or insecticides states that imports will be refused admission if they appear adulterated or misbranded or are dangerous to the health of U.S. citizens. *Id.* at 334.

19. See Leticia M. Diaz, *Prozac or Less Pesticides? The Link Between Juvenile Violence and Pesticide Exposure*, 2 BARRY L. REV. 19, 24 (2001) (discussing pesticide regulation).

cause it only addressed labeling and redressability of fraudulent claims.²⁰

B. Federal Insecticide, Fungicide and Rodenticide Act

In 1947, Congress provided additional protection and the regulation when it enacted the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA).²¹ FIFRA was adopted by Congress as a broader replacement for the Federal Insecticide Act of 1910. Since its passage in 1947, Congress has amended FIFRA several times.²² In addition to establishing labeling oversight, FIFRA expanded government powers by creating the Environmental Protection Agency (EPA) in 1970.²³ FIFRA addressed issues concerning health and environmental standards.²⁴

Federal law requires EPA to register all pesticides used and distributed in the United States.²⁵ FIFRA empowers EPA to require all pesticide purchasers to register at the time of purchase.²⁶ FIFRA's main purpose is to ensure federal regulation of pesticide distribution and use.²⁷ Through such regulation, FIFRA aims to protect humans from the deleterious effects of pesticides while balancing the need for pesticides in agriculture.²⁸ Since its inception in 1947, FIFRA has mandated the registration of thousands of pesticides

20. *Id.* (stating that Act provided protection from fraudulent claims by manufacturers).

21. 7 U.S.C. § 136 (1999) (establishing regulatory system for controlling sale, distribution and application of pesticides).

22. See Diaz, *supra* note 20, at 25 (discussing Federal Insecticide, Fungicide and Rodenticide Act [hereinafter FIFRA] amendments).

23. See *id.* at 24 (establishing new dimensions of protection under FIFRA); see also Environmental Protection Agency [hereinafter EPA], *The Guardian: EPA's Formative Years, 1970-1973, Pesticides and Public Health*, at <http://www.epa.gov/history/publications/formative6.htm> (updated June 11, 2002) (providing informative summary of EPA's role in pesticide regulation and public health). EPA was established in 1970 and was given its oversight role for pesticides in 1972. See *id.* EPA serves an integral role in enforcing protective devices under FIFRA. See *id.* EPA's creation coincided with the culmination of the public debate over DDT. See *id.*

24. See Diaz, *supra* note 20, at 24 (discussing additional protection afforded); see also James Smart, *All the Stars in the Heavens Were in the Right Places: The Passage of the Food Quality Protection Act of 1996*, 17 STAN. ENVTL. L.J. 273, 277 (1998).

25. See EPA, *Region 5: Federal Insecticide, Fungicide, and Rodenticide Act*, available at <http://www.epa.gov/region5/defs/html/fifra.htm> (last visited Oct. 24, 2002) [hereinafter *Region 5*].

26. 7 U.S.C. § 136a (2001).

27. See *Region 5*, *supra* note 26 (discussing FIFRA's main purpose).

28. See John M. Megara, Comment, *The Rose Industry Exception for Early Entry Into Pesticide Treated Greenhouses: Romance in Regulation*, 25 B.C. ENVTL. AFF. L. REV. 941, 944 (1998) (discussing history of pesticide legislation); see also Federal Insecticide, Fungicide, and Rodenticide Act ("Federal Environmental Pesticide Control Act"), available at <http://ipl.unm.edu/cwl/fedbook/fifra.html> (citing authority of

under continually evolving standards.²⁹ For example, test data requirements have become progressively more stringent due to significant strides in scientific progress.³⁰ To assure parity in registration standards,³¹ EPA assesses pesticides registered prior to contemporary scientific and regulatory standards for possible irregularities.³² This re-registration process has proven burdensome due to the high number of pesticides registered since 1947.³³

A pesticide registration applicant must submit a statement and supporting data for proposed labeling, instructions for use and any other pertinent information useful to the EPA Administrator.³⁴ Based on this and other relevant data, the Administrator classifies the pesticide for either general or restricted use.³⁵ The Administra-

EPA to suspend or cancel registrations for pesticides which are believed to have deleterious effects on environment).

29. See *Megara*, *supra* note 29, at 944 (explaining that standards have evolved serially with science and public policy).

30. See *id.* (citing advances in toxicology and analytical chemistry as causes for increased test data scrutiny).

31. See *id.* A registration standard would normally consist of a comprehensive review of all data known to exist for the chemical, a list of any additional data which would be needed for compliance for full re-registration, as well as the EPA's regulatory position on the pesticide at issue. *Id.*

32. See *id.* (discussing EPA "registration standards" mandated by FIFRA).

33. See Press Release, EPA, *FIFRA Amendments of 1988* (Oct. 26, 1988), at <http://www.epa.gov/history/topics/fifra/01.htm> [hereinafter EPA Press Release] (explaining FIFRA requirement of pesticide registration).

34. See 7 U.S.C. § 136a (2001) (outlining procedures for registration of pesticides).

35. See 7 U.S.C. § 136a(d)(1)(B) (2001).

If the Administrator determines that the pesticide, when applied in accordance with its directions for use, warnings and cautions and for the uses for which it is registered, or for one or more of such uses, or in accordance with a widespread and commonly recognized practice, will not generally cause unreasonable adverse effects on the environment, the Administrator will classify the pesticide, or the particular use or uses of the pesticide to which the determination applies, for general use.

7 U.S.C. § 136a(d)(1)(C) (2001).

If the Administrator determines that the pesticide, when applied in accordance with its directions for use . . . may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, including injury to the applicator, the Administrator shall classify the pesticide, or the particular use or uses to which the determination applies, for restricted use: (i) If the Administrator classifies a pesticide, or one or more uses of such pesticide, for restricted use because of a determination that the acute dermal or inhalation toxicity of the pesticide presents a hazard to the applicator or other persons, the pesticide shall be applied for any use to which the restricted classification applies only by or under the direct supervision of a certified applicator. (ii) If the Administrator classifies a pesticide, or one or more uses of such pesticide, for restricted use because of a determination that its use without additional regulatory restriction may cause unreasonable adverse effects on the environment, the pesticide shall be applied for any use to which

tor then registers the pesticide after assessing whether any restrictions should be placed on its use and determining whether its composition merits the proposed claims and labeling.³⁶ The Administrator conducts a cost-benefit analysis in its initial decision of registering a particular pesticide.³⁷

Congress amended FIFRA in 1988. The focus of the 1988 amendments was the re-registration provisions.³⁸ The provisions mandate rigid deadlines for pesticide registrants responsible for furnishing data necessary for EPA officials to make decisions regarding the re-registration of a particular compound.³⁹ EPA must also meet strict deadlines in its re-registration decisions.⁴⁰

The expansion under the 1988 amendments of EPA's authority to regulate the storage, transportation and disposal of pesticides is of particular note. EPA is empowered with the authority to regulate the storage, transportation and disposal of pesticides and to require data on methodology.⁴¹ This power is of particular importance given the terroristic threat of possible chemical warfare.⁴²

the determination applies only by or under the direct supervision of a certified applicator, or subject to such other restrictions as the Administrator may provide by regulation. Any such regulation shall be reviewable in the appropriate court of appeals under petition of a person adversely affected filed within 60 days of the publication of the regulation in final form.

Id.

36. 7 U.S.C. § 136(a)(2001). Specifically, the Administrator must determine that the pesticide will function as represented without "unreasonable adverse effects on the environment." *Id.*

37. See Megara, *supra* note 29, at 944-45. The Federal Environmental Pesticide Act [hereinafter FEPCA] amended FIFRA in 1972. This act provides authority for engaging the cost/benefit analysis in registering pesticides. *Id.* at 945. Under FIFRA, "unreasonable adverse effects on the environment" evaluates the "economic, social and environmental costs and benefits of the use of any pesticide," effectively a cost-benefit analysis. *Id.*

38. EPA Press Release, *supra* note 34; see also 7 U.S.C. § 136a-1 (2001); Linda J. Fisher et al., *A Practitioner's Guide to the Federal Insecticide, Fungicide, and Rodenticide Act: Part III*, 24 ENVTL. L. REP. (Envtl. L. Inst.) 10629 (1994).

39. See 7 U.S.C. § 136a-1 (2001) (stating time requirements for data submission under phase two of re-registration process).

40. See EPA Press Release, *supra* note 34 (noting principal focus of 1988 FIFRA Amendments). The EPA must analyze data in a timely manner and determine whether a chemical will be afforded re-registration. *Id.*

41. See 7 U.S.C. § 136q (2001) (discussing storage, disposal, transportation and recall).

42. See Amanda Onion et al., *Considering the Unthinkable: Is the U.S. Ready to Handle Widespread Biological or Chemical Attacks?* (Sept. 24, 2001), available at http://abcnews.go.com/sections/us/DailyNews/WTC_chemicalbiologicalqa.html (explaining why some experts believe U.S. should be on high alert for chemical or biological attack).

The most recent amendments to FIFRA were in 1996. Under the 1996 amendments, FIFRA offers expedited review.⁴³ Review is expedited in cases where a proposed pesticide would reduce the risk to the public and other environmental resources.⁴⁴ These amendments were also instrumental in establishing a review process for all registrations.⁴⁵

III. APPLICATORS — IS THE PRESENT REGULATORY SYSTEM SUFFICIENTLY STRINGENT GIVEN THEIR POTENTIAL MISUSE?

Kevin Keaney, head of the Office of Pesticide Programs Certification and Worker Protection Branch, has expressed concerns regarding the efficacy of present regulations with respect to pesticide distribution and storage systems.⁴⁶ Keaney believes that “the applicators are the strongest or weakest links in the effort to confront chemical terrorism.”⁴⁷ The regulations at issue are federal pesticide rules that “do not require testing for private applicators” under FIFRA.⁴⁸ FIFRA has outdated distinctions between commercial and private applicators.⁴⁹ Keaney espouses a system where federal law would mandate testing for both commercial and private applicators.⁵⁰ Keaney’s views support proposals posed by this article, as both private and commercial applicators may fall prey to terroristic or illicit aggression. Distinctions may be made between private and commercial applicators, however private applicators should not be regarded as any less vulnerable. Such a gap would be contraindi-

43. See 7 U.S.C. § 136a(c)(10) (2001) (discussing expedited pesticide registration).

44. See generally *id.* § 136a(c)(10)(B) (2001) (noting when proposed pesticide qualifies for expedited review).

45. See *id.* § 136a(g)(1)(A) (2001) (addressing periodic review of pesticide registrations). The objective is to strive for review every fifteen years. *Id.*

46. See Zahodiakin, *supra* note 14, at 14. Mr. Keaney presented his views regarding the implementation of potentially harsh measures to thwart pesticides used as weapons at the December 4, 2001 session of the Pesticide Program Dialogue Committee meeting in Arlington, Virginia. See *id.*

47. *Id.* (noting Keaney’s concern over use and misuse of applicators).

48. See *id.* (discussing FIFRA’s distinctions for commercial and private applicators); see also 7 U.S.C. § 136 (2001) (explaining problem of federal pesticide rule under FIFRA). “Such program shall conform to the requirements imposed upon the states under the provisions of subsection (a)(2) of this section and shall not require private applicators to take any examination to establish competency in the use of pesticides.” *Id.*

49. See Zahodiakin, *supra* note 14, at 14. Mr. Keaney advocates restrictions to ensure that restricted-use pesticides do not fall prey to an illicit user. See *id.* He also advocates a national system which would require a photo identification and/or proof that the purchaser has taken the applicators exam. See *id.*

50. See *id.* (identifying Keaney’s view supporting mandatory applicator testing).

cated by the creation of an overall policy of pursuing a safer and more efficient manner of tracking applicators and the chemicals they deliver. Additionally, a uniform system under FIFRA would enable the government to punish more violators. Presently, the government may fine commercial applicators, dealers and other distributors in violation up to \$25,000 per violation or imprison them for up to one year, or both.⁵¹

Keaney's concerns are echoed by states across the country, some of which have implemented stringent regulations in response to the September 11th terrorist attacks.⁵² For example, Indiana's pesticide administrator, Dave Scott, endorses recognition of competencies between states having similar requirements for pesticide applicators.⁵³ This would allow an applicator certified in Indiana to work in another state without having to be re-certified, though he or she may be required to obtain a permit or license in accordance with local state rules.⁵⁴ This type of proposal may indicate a move toward creating uniformity in certification requirements among states with respect to security issues involving pesticide applicators. EPA Region 5 may be the first in the nation to establish a regional certification program for pesticide applicators.⁵⁵ Manufacturers and chemical applicators intend their substances to be used to eliminate pests and not people, but in the wrong hands, the latter result could occur.⁵⁶ Applicators, therefore, should be regulated in a manner designed to frustrate terrorists' objectives of using weapons of mass destruction.

51. Elizabeth M. Jalley et. al., *Environmental Crimes*, 39 AM. CRIM. L. REV. 403, 469 (2002). Under FIFRA, lesser penalties are imposed for private applicators. See *id.* at 470. See also Agricultural Adjustment Act of 1938, 7 U.S.C. § 136l (1999).

52. See Kevin Keaney, *N.C. Rule Aims to Keep Chemicals Away from Terrorists*, PESTICIDE & TOXIC CHEM. NEWS, Apr. 1, 2002, at 9 (requiring sales records from anyone who purchases restricted use pesticides); see also Phil Zahodiakin, *Pesticide Security Featured in Florida Terror Legislation*, PESTICIDE & TOXIC CHEM. NEWS, Jan. 7, 2002, at 19 (noting regulations established in response to September 11th terrorist attacks).

53. See Keaney, *Rules and Regulations for 2002 Highlighted at Pest Control Conference; Retail Staff May Have to be Registered to Dispense Info Regarding Pesticides*, PESTICIDE & TOXIC CHEM. NEWS, Jan. 14, 2002, at 1. Scott states, "[i]n Indiana, we'll establish reciprocal agreements with just about any state that is interested in it. The ink just dried last week on an agreement with Kentucky that we had been working on for the past 20 years." *Id.*

54. See *id.* (explaining significance of competency recognition between states).

55. See *id.* (highlighting importance of EPA Region 5).

56. See Walter E. Mugdan, *Environmental Law Issues Raised by Terrorists Events in 2001*, 7 ALB. L. ENVTL. OUTLOOK 67, 91 n.71 (2002) (noting danger if pesticides and chemicals are used against people).

IV. PESTICIDE SAFETY — WHO HAS ACCESS TO PESTICIDES?

A. Accessibility of Pesticides: Too Much or Just Right? Chemical Site Security

In 1993, a bomb exploded in a World Trade Center garage in New York City, killing six people.⁵⁷ Other attacks using weapons of mass destruction⁵⁸ have similarly killed and injured many people, destroying property in significant proportions.⁵⁹ One example is the intentional release of the lethal “sarin”⁶⁰ gas in the Tokyo subway system in 1995.⁶¹ The gas killed at least twelve people and injured thousands.⁶²

These terror incidents, along with the September 11th events, underscore the need for stringent regulatory measures at the federal, state and local levels. As former U.S. Senator Sam Nunn stated, “[w]e cannot afford to wait for an incident involving weapons of mass destruction. We cannot afford to be unprepared at any level.”⁶³

Chemical professionals were cognizant of the importance of site security even prior to the September 11th terrorist attacks.⁶⁴ The American Chemistry Council (ACC),⁶⁵ the Synthetic Organic

57. EPA, *EPAs Role In Counter-Terrorism Activities, Fact Sheet* (Feb. 1998), at <http://www.epa.gov/ceppo> [hereinafter EPA Fact Sheet]. In addition to the six people killed, one thousand were injured and millions of dollars were spent in repairing the damage. See *id.*

58. See *id.* Weapons of mass destruction can be described as “weapons or devices that are intended, or have the capability, to cause death or serious bodily injury to a significant number of people, through the release, dissemination or impact of toxic poisonous chemicals; disease organisms; or radiation or radioactivity.” *Id.*

59. See *id.* (noting catastrophic effect of weapons of mass destruction).

60. See EPA, *Emergency First Aid Treatment Guide for Sarin*, at <http://www.epa.gov/swercepp/ehs/firstaid/107448.txt> (last visited Sept. 26, 2002). Sarin is a colorless liquid and vapor which is extremely toxic through all routes of exposure. *Id.* Death may occur within one to ten minutes of inhalation exposure to a miniscule amount of sarin. *Id.*

61. See EPA Fact Sheet, *supra* note 58 (noting example of toxic sarin attack in Tokyo’s subway).

62. *Id.* Another example occurred in 1995 when a bomb exploded in front of a Federal Building in Oklahoma City. That incident killed 165 people and injured many more people. The cost to the federal government and local businesses was in the millions of dollars. *Id.*

63. *Id.* (quoting comment by Senator Nunn regarding weapons of mass destruction).

64. See *Guide to Site Security in the U.S. Chemical Industry, Executive Summary*, AM. CHEMISTRY TODAY, Sept. 5, 2002, available at <http://www.americanchemistry.com/cmaweb site.nsf/unid/nnar-53rkt8?OpenDocument> [hereinafter *Guide to Site Security*] (showing awareness by chemical professionals of site security).

65. See Chris VandenHeuvel, *Chemical Makers Adopt Tough Security Measures*, AM. CHEMISTRY TODAY, Jan. 30, 2002, available at <http://www.americanchemistry>.

Chemical Manufacturers Association (SOCMA) and the Chlorine Institute prepared a guide for implementing a quality site security management system.⁶⁶ The suggestions articulated in the guide detail ordinary aspects of a good security system and make suggestions as to how companies should tailor their facilities to their particular situation.⁶⁷ Additionally, the ACC has mandated that all members implement enhanced security measures to assure American people that their organization and its members are proactive in securing the homeland.⁶⁸

Some states have taken strong initiatives to keep pesticides away from terrorists.⁶⁹ For example, North Carolina's state pesticide board implemented a rule requiring pesticide dealers to retain records of restricted-use pesticides, and to verify the purchaser's identity and that the purchaser is a licensed or certified applicator.⁷⁰ Additionally, in response to the September 11th terrorist attacks, the board promoted vigilance by dealers of suspicious activity involving pesticide sales.⁷¹

Likewise, Florida has a new package of legislation aimed at increasing pesticide security. Governor Jeb Bush signed Senate Bill 14-C,⁷² directing the Department of Agriculture and Consumer Ser-

com/cmawebiste.nsf/unid/nnar-56vjye?OpenDocument. The American Chemistry Council [hereinafter ACC] represents major companies whose primary businesses are in the field of chemistry. Council members are responsible for the production of innovative products and services that enhance the quality of life. *Id.*

66. See *Guide to Site Security*, *supra* note 65 (discussing U.S. Chemical Industry site security guidelines developed by company security professionals). The guide focuses on assisting companies to expand and improve their existing security programs. *Id.*

67. See *id.* Examples include information on employee and contractor security issues. *Id.*

68. See VandenHeuval, *supra* note 66. All ACC members will "screen their facilities to identify any that may require the most immediate attention; assess potential security vulnerabilities; identify and undertake specific steps to improve security; and utilize independent third parties to verify that the security improvements have been implemented." *Id.*

69. See Keaney, *N.C. Rule*, *supra* note 53 (explaining state initiatives to keep harmful pesticides from terrorists).

70. See *id.* The sales records must be kept for three years and must include the following: date of sale, initials of sales clerk, name of certified or licensed applicator, certification or license number of card, expiration date on card, the brand name of the product, EPA registration number, number and size of individual containers and the total of quantities sold. *Id.*

71. See *id.* Activity considered suspicious would include: out of season requests for pesticides, unusual requests for pesticides and orders from someone unfamiliar who might not have a nexus to the pesticide business. *Id.*

72. Florida Bill 14-C established requirements governing aircraft used for aerial application of pesticides and storage of pesticides used by aerial pest applicators (codified as amended in scattered sections of FLA. STAT. chs. 487.051, 570.07, 576.181, 578.11) (2001).

vices to promulgate tougher regulations on pesticide storage and aerial pesticide applications.⁷³ Tim Moore, Commissioner of the Florida Department of Law Enforcement, applauded the measure, stating:

this legislation puts into place the tools needed to help not only law enforcement as we move to prevent a terrorist attack, but also to enhance the response of all members of this incredible team, from the first responders to our local governments, public and private agencies and our state and federal partners.⁷⁴

B. Agency Response

Prior to the September 11th terrorist attacks, the U.S. government responded to these types of threats in a cooperative endeavor involving EPA, the Department of Defense (DOD), the Department of Energy, the Federal Bureau of Investigation (FBI), the Federal Emergency Management Agency (FEMA) and the Public Health Service.⁷⁵ In the aftermath of September 11th, it became even more evident that a shared effort was necessary.

With respect to the risk of terrorist attacks using pesticides or other chemical agents, EPA suggested that “those who manufacture, distribute, transport or store pesticides should continue to be vigilant regarding the physical security of those pesticides.”⁷⁶ This warning suggests an intensified focus on common chemicals in the common store, leading to more questions. Is the corner hardware store included as one who “distributes” or “stores” pesticides? If so, should it fall under the same umbrella as large chemical companies and manufacturers?

73. See Zahodiakin, *Pesticide Security*, *supra* note 53, at 19 (addressing stricter state regulations for dangerous pesticides). The Bill was sponsored by Sen. Steven Geller (R-Hallandale Beach) and Rep. Dudley Goodlette (R-Naples). *Id.*

74. See *id.* at 15 (discussing benefits of Bill 14-C). Commissioner Moore's comments emphasized the teamwork and cooperative activity needed for effective response to any type of attack. *Id.*

75. See Megara, *supra* note 29. In the aftermath of September 11th, other existing agencies may be participating and new agencies have been created. For example, the Office of Homeland Security was created by President Bush to develop and coordinate a comprehensive national strategy to strengthen protections against terrorist attacks in the United States. See The White House, *Frequently Asked Questions*, at <http://www.whitehouse.gov/response/faq-homeland.html> (last visited Apr. 7, 2003).

76. Office of Pesticide Programs, EPA, *Pesticide Security Advisory*, Sept. 26, 2002, at http://www.epa.gov/oppfead1/cb/csb_page/updates/9-24securityadvis.htm.

EPA has made significant strides in response to the need for increased homeland security. Among its many contributions, EPA published a Chemical Safety Alert entitled "Chemical Accident Prevention: Site Security."⁷⁷ The EPA Office of Pesticide Programs has also issued an alert to all pesticide industrial organizations stressing awareness of the nation's heightened state of security.⁷⁸ The alert stresses the potential vulnerability of businesses to internal and external threats and establishes guidelines for evaluating pesticide security.⁷⁹ Shortly after September 11th, EPA also implemented a controversial measure when it "dismantled its website which informed communities of dangers from 15,000 chemical plants and other industrial facilities," considering it "sensitive information."⁸⁰ "This has received so much publicity that we decided to take the information down," Jim Makris, an EPA spokesperson stated. "We're trying to decide whether it was the proper thing to do."⁸¹

Other federal agencies have also increased their efforts to lower the risk of terrorist attacks. The FBI, for example, requests that threats or suspicious behavior be reported in an expeditious manner.⁸² Sandia National Laboratories, under the auspices of the U.S. Department of Justice, constructed a "Chemical Facility Vulnerability Assessment Methodology" (VAM), a device that chemical facilities may use to assess security vulnerabilities.⁸³

77. *Id.*; see also Office of Solid Waste and Emergency Response, EPA, *Chemical Accident Prevention: Site Security* (Feb. 2000), at <http://www.epa.gov/swercepp/pubs/secale.pdf> (discussing EPA's contribution to chemical safety).

78. Office of Pesticide Programs, EPA, *Pesticide Alert, Pesticide Safety and Site Security* (Jan. 11, 2002), at http://www.epa.gov/pesticides/citizens/pest_secu_alert.htm (addressing heightened state of alert of businesses that sell pesticides).

79. *Id.* Some of the principal security control points include: securing buildings, manufacturing facilities, storage areas and surrounding property and securing pesticide application equipment and vehicles. *Id.* Aerial application equipment should be carefully supervised, confidential information must be protected, facilities and equipment should be designed to minimize risk of damage and procedures and policies that support security needs should be developed. *Id.* Timely cooperation with authorities is vital. *Id.*

80. *EPA Removes Chemical Data From Website*, 21 PESTICIDES & YOU 4 (Nov. 4, 2001), available at <http://www.beyondpesticides.org/infoservices/pesticidesandyou/>

81. [Winter%2001-02%20vol.%2021%20no.%204.pdf](http://www.epa.gov/pesticides/citizens/pest_secu_alert.htm) (addressing EPA's removal of chemical data from its website). *Id.* (noting increased publicity of information as reason to dismantle website).

82. See EPA, *Pesticide Security*, *supra* note 77 (discussing increased vigilance by Federal Bureau of Investigation [hereinafter FBI]).

83. See Office of Justice Programs, U.S. Department of Justice, *A Method to Assess the Vulnerability of U.S. Chemical Facilities*, at <http://www.ncjrs.org/pdffiles1/nij/195171.pdf> (last visited Apr. 7, 2003) (discussing creation of Chemical Facility Vulnerability Assessment Methodology [hereinafter VAM]).

C. Legislative Relief, Security or Controversy?: The Chemical Security Act of 2001

Congress had introduced site security legislation prior to the September 11th terrorist attacks. For example, President Clinton signed the Chemical Safety Information, Site Security and Fuels Regulatory Relief Act⁸⁴ into law on August 5, 1999.⁸⁵ This Act responded to security concerns regarding the electronic distribution of databases derived from off-site consequence analysis sections of risk management plans.⁸⁶ The Act limited public access that could compromise security.⁸⁷ However, September 11th introduced controversy regarding government intervention into site security issues and numerous legislative actions have been introduced as a result.⁸⁸ In response to possible chemical and environmental threats, a bill entitled the "Chemical Security Act of 2001"⁸⁹ (Act) merits the most attention. The Act, introduced by Senators Corzine (NJ), Jeffords (VT), Clinton (NY) and Boxer (CA), allows the government to identify the most vulnerable or unguarded domestic chemicals and impose an affirmative duty on relevant parties to maintain records of the existing possibility of their accidental or intentional dis-

84. Pub. L. No. 106-40, 113 Stat. 207 (1999) (codified as amended at 42 U.S.C. 7412) (noting date of passage of Site Security and Fuels Regulatory Relief Act).

85. Chemical Emergency Preparedness and Prevention Office, EPA, *Chemical Safety Information, Site Security and Fuels Regulatory Relief Act: Public Meetings and Other Notifications* (Oct. 1999), at [http://www.epa.gov/oswer/ceppoweb.nsf/vwResourcesByFilename/fbi-4.PDF/\\$File/fbi-4.PDF](http://www.epa.gov/oswer/ceppoweb.nsf/vwResourcesByFilename/fbi-4.PDF/$File/fbi-4.PDF) (noting date of passage of law during Clinton administration).

86. *Id.* ("[C]oncerns were raised that widespread electronic distribution of a database derived from the OCA sections of RMPs could a security risk").

87. *Id.* (expressing public meetings as method of informing public of concerns).

88. See Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Bioterrorism Act), Pub. L. No. 107-188, 116 Stat. 594 (2002) (codified in scattered sections of 7 U.S.C., 21 U.S.C., 29 U.S.C., 42 U.S.C.), available at <http://www.fda.gov/oc/bioterrorism/PL107-188.html> (last visited Apr. 7, 2003); see Agriculture Security Preparedness Act, S. 2767, 107th Cong. (2002); A Bill To Enhance Agricultural Biosecurity in the United States Through Increased Prevention, Preparation, and Response Planning, available at <http://www.pestlaw.com/x/law/S2767.html>. This Bill covers agro terrorism, destruction of farm crops, livestock and terrorist acts involving weapons of mass destruction. As of this writing, the Bill had been referred to the Senate Committee on Agriculture, Nutrition, and Forestry for review. For a complete listing of all legislation related to the attacks of September 11, 2001, see generally <http://thomas.loc.gov/home/terrorleg.htm> (Oct. 3, 2002) (compiling list of bills and joint resolutions signed into law as result of September 11th attacks).

89. Chemical Security Act of 2001, S. 1602, 107th Cong., 147 CONG. REC. 11288 (2001) (enacted), available at <http://www.cpda.com/teampublish/uploads/S1602.pdf> [hereinafter Act] (describing purpose of helping protect public against threat of chemical attacks).

charge.⁹⁰ Under the Act, EPA would have one year to categorize priority chemicals and their sources, based on proximity to population areas, degree of threat to security and infrastructure and the amount of chemical required to cause a serious threat.⁹¹ Thereafter, EPA would promulgate feasible regulations mandating owners to take actions to minimize identifiable threats.⁹²

At first glance, the Act appears innocuous and demonstrates a move in the right direction to improve homeland protection. However, the Act soon met with stiff opposition, as some legislators argued that the Act "makes it a crime for facilities to be victims of a crime."⁹³ Some voiced concern over perceived overreaching and intrusiveness on the part of the government without any overt assurance of increased security.⁹⁴ Legislators were not the only ones to express reservations. The ACC also expressed doubt on a number of issues. Fred Webber, an ACC member, warned of possible encroachment on existing statutes.⁹⁵ Additionally, SOCMA expressed

90. PESTICIDE INFORMATION OFFICE, UNIVERSITY OF FLORIDA, *Pending Chemical Legislation as a Result of Terrorism*, in CHEMICALLY SPEAKING (Nov. – Dec. 2001), at <http://pest.ifas.ufl.edu/CMSP-2001/11-12cmsp01.htm#c> (classifying new law as "most significant federal toxics-related legislation" since attacks of September 11th).

91. *Id.* The EPA would work in conjunction with the Department of Justice. *Id.* These agencies would then be given a second year to formulate regulations to take "adequate actions" to minimize identified threats. *Id.*

92. *Id.* Additionally, EPA and the State Department would have a "right of entry" into chemical facilities, as well as mandatory record keeping which could be made public if no confidentiality exemptions were granted. *Id.*

93. PESTICIDE INFORMATION OFFICE, UNIVERSITY OF FLORIDA, *supra* note 91 (adding also that legislators felt Act would give government control over manufacturing processes).

94. *Id.* Specifically, legislators opposing the legislation thought the government would be given control over the manufacturing process. *See id.* Additionally, one legislator (Smith, NH) stated, "[a] strained relationship between the private sector and the government is not going to lead to increased security." *Id.*; *see also Chemical Security Act of 2001: Hearings on S. 1602 Before the Subcomm. on Superfund, Toxics, Risk and Waste Management of the Senate Comm. on Environment and Public Works, 107th Cong. (2001)* (statement of William Stanley, Regulatory Manager, Deepwater Chemicals). Mr. Stanley primarily addressed the impact this Bill would have on small and specialty chemical producers; the issue of criminal/civil liability and the great burden this would have on small companies; the problem of EPA in a command and control, adversarial position and the broad delegation of authority of EPA to regulate chemical sources, given that the Bill casts EPA in the role of expert with respect to threats and infrastructure of a company. *Id.*

95. PESTICIDE INFORMATION OFFICE, UNIVERSITY OF FLORIDA, *supra* note 91 (warning against encroachment on existing statutes). The following comprise possible areas of encroachment according to Webber: (i) "the 'duty clause' of S. 1602 is duplicative of a general duty clause contained in the Clean Air Act applying to owners and operators of stationary sources producing, processing, handling or storing extremely hazardous substances to prevent accidental releases" and (ii) the "imminent and substantial endangerment provisions" of S. 1602 'overlap com-

displeasure with the bill,⁹⁶ as did the International Sanitary Supply Association (ISSA), stating that “[t]he CSA of 2001 would be inappropriate.”⁹⁷ ISSA finds the liability burden attributed to the chemical industry unfair because it “thrusts responsibility for the criminal attacks of third parties on the facility owner or operator.”⁹⁸

According to EPA, each of the 123 chemical facilities in the U.S. threatens a million or more nearby residents.⁹⁹ A number of facilities have demonstrated the possibility of changing operations or chemicals to improve safety. A few weeks after the September 11th terrorist attacks, the Blue Plains sewage treatment plant near Washington, D.C. stopped using chlorine and began using a much less toxic disinfectant.¹⁰⁰ Unfortunately, only a tiny fraction of industry leaders publicly agreed to make much needed improvements at high-risk facilities. For those that did, EPA has no verification technique to discern the sufficiency of the improvements.¹⁰¹

The outlook for tighter security within the industry looks grim unless regulatory measures are adopted. For example, on July 14, 2002, almost a full year after the September 11th terrorist attacks, security measures were absent at a facility where a terrorist event could jeopardize the well-being of several million people in the

pletely’ with a portion of the Comprehensive Environmental Response Compensation and Liability Act (CERCLA).” *Id.* Webber also objected to the so-called overly broad scope of the Bill. *Id.* He states that the inclusive definition of pollutants could contain an infinite range of materials. *Id.*

96. See *Chemical Industry and Its Detractors Spar Over Proposed Senate Bill*, 12 HAZMAT TRANSPORT NEWS, Dec. 1, 2001, at 22 (reporting that industry finds bill overzealous). American Chemistry Council President Fred Webber stated it would “be a crime to be a victim of a crime.” *Id.* Bill Stanley, President of Synthetic Organic Chemical Manufacturers Association [hereinafter SOCMA], voiced equal concern in warning that the Bill would have the toughest consequences on the smallest companies. *Id.* “Any company that produces, mixes, blends, modifies or even handles a high-priority substance may be subject to the new regulatory obligations It would be burdensome even to ascertain whether and when subsequent regulations apply.” *Id.*

97. Daniel Wagner, *Chemical Security Act of 2001 Would be Inappropriate*, INTERNATIONAL SANITARY SUPPLY ASSOCIATION (Feb. 12, 2002), available at <http://www.issa.com/features/leg/202Feb19.html> (highlighting that Chemical Security Act of 2001 is not solution).

98. *Id.* (arguing that this burden is unfair).

99. See Environmental Media Services, *Fast Facts*, at http://www.ems.org/chemical_plants/facts.html (last modified June 19, 2002) (listing ratio of plants to number of people at risk).

100. *Id.* (discussing dangers of chlorine and chemical plant disaster scenario).

101. Carol Andress, *Preventing a Chemical Catastrophe*, ORLANDO SENTINEL, Sept. 22, 2002, at G5 (detailing other incidents of poor security following September 11th).

New York metropolitan area.¹⁰² Also, a lack in overall security was observed when a *Pittsburgh Tribune-Review* reporter was easily able to gain admittance to sixty chemical factories, shippers and warehouses in western Pennsylvania, Baltimore, Chicago and Houston.¹⁰³ These incidents underscore the need for legislation to assure the public that preventative measures are mandatory, not voluntary.

The Chemical Security Act of 2001 would alleviate the disparity among manufacturers regarding the method, if any, of ensuring security. EPA and the Department of Homeland Security would identify facilities posing the greatest public threat and require them to assess vulnerabilities and develop plans for reducing future chemical hazards and environmental threats.¹⁰⁴ In light of numerous pronouncements by the government regarding the rising level of unspecified terror threats, the nation would benefit from the passage of the Act.¹⁰⁵

D. Emergency Response Plans: Addressing the Fallout from Deliberate Releases

The threat that terrorists will deliberately release chemical and biological compounds has increased over the years.¹⁰⁶ If terrorists attack with chemical or biological agents, rapid and inviolable communications will be essential to ensure a swift and coordinated reac-

102. *Id.* (estimating that these facilities could endanger six million Americans).

103. *Id.* (describing examples of security lapses).

104. *Id.* (describing requirements under legislation proposed by Senators Corzine and Jeffords). Under the Act, companies would be required to adopt safer alternative processes. *See id.* Those companies that have already undergone reform in conformance with the Act would be given credit for their early compliance. *Id.*

105. *See Corzine Reintroduces Chemical Security Act; Marketplace; Senator Introduces Chemical Security Act*, 263 CHEMICAL MARKET REPORTER, Jan. 20, 2003, at 24 (reporting reintroduction of Act to Senate). The Act was recently reintroduced by Senator Jon Corzine (D-N.J.), who stated, "[t]here are 110 chemical plants scattered across America where a terrorist attack could expose more than one million people to a cloud of toxic chemicals In spite of this enormous risk, we have no federal security standards in place for chemical plants. Congress and the Bush Administration need to act swiftly to close this homeland security gap." *Id.* Although the bill was passed by the Senate Committee on Environment and Public Works last July, it did not make it to the Senate floor. *See id.*

106. CHEMICAL EMERGENCY PREPAREDNESS AND PREVENTION OFFICE, EPA, *LEPCs and Deliberate Releases: Addressing Terrorist Activities in the Local Emergency Plan* (Aug. 2001), at <http://www.epa.gov/ceppo/factsheets/epcct.pdf> (suggesting that local emergency planning committees [hereinafter LEPCs] should review existing plans and consider incorporating counter-terrorism measures).

tionary response.¹⁰⁷ To communicate quickly and effectively, an emergency plan including varying degrees of contact information should be in place. At a minimum, such plans should include up-to-date information for fire, medical, law enforcement and other emergency services.¹⁰⁸

Local emergency planning committees (LEPCs)¹⁰⁹ were established under the Emergency Planning and Community Right-To-Know Act.¹¹⁰ The purpose of these planning committees is to prepare and maintain comprehensive emergency plans in the event of any hazardous chemical releases. They should be able to anticipate the outcome of such a release based on whether the release is intentional, such as a deliberate release caused by terrorists. The LEPCs should modify these plans as needed to include reactionary measures to terrorist activities.

An intricate aspect of any response plan is the identification of responders in the event of a terrorist attack.¹¹¹ A local responder should notify local, state and federal authorities if the incident encompasses characteristics of an act of terrorism.¹¹² The FBI is the lead federal agency for domestic terrorism involving weapons of mass destruction. The FBI will head all crisis management activities necessary to respond to the ensuing threat.¹¹³

107. *Id.* (outlining steps to prevent terrorism).

108. *See id.* (explaining that information for state officials such as those at public health agencies, State Emergency Response Commission (SERC) and state police and emergency management agencies should be included). *See id.* (noting that National Response Center, sole federal point of contact for oil and chemical spills, is now provider of Chemical and Biological Hotline). *See id.* (explaining that, as such, this number (800-424-8802) should be part of emergency plan).

109. *See* CHEMICAL EMERGENCY PREPAREDNESS, EPA, *supra* note 107 (noting that members of LEPC committees are diverse in nature). For example, members may be elected state or local officials, police or fire officials, environmental, hospital or transportation officials or representatives of facilities where chemicals are stored or used. It has been suggested that a new "type" of members with specific expertise in dealing with biological agents be added.

110. *See generally* 42 U.S.C. §§ 11001-11050 (2001) (outlining emergency planning requirements and community involvement in this planning).

111. *See* First Responders, at <http://www.wmdfirstresponders.com/member-ship.htm> (last visited Dec. 25, 2002) (listing first responder volunteers in all fifty states).

112. *See id.* (stating that, to have effective control, local response team, *i.e.*, senior fire or law enforcement officials, should take command at scene and then send notification to appropriate state or federal authorities).

113. *Terrorism: Are America's Water Resources and Environment at Risk: Hearing Before the Subcomm. on Water Res. & Env't. of the House Comm. on Transp. & Infrastructure*, 107th Cong. (2001) (statement of Ronald L. Dick, Deputy Assistant Dir. & Dir., Federal Bureau of Investigation), at <http://www.fbi.gov/congress/congress01/rondick101001.htm> (identifying FBI's role in this type of terror threat).

FEMA¹¹⁴ coordinates federal support to state and local responders during a crisis.¹¹⁵ FEMA usually becomes involved after a Presidential declaration and after state and local agencies request its assistance.¹¹⁶ At the conclusion of crucial stages, when crisis management activities have completed their work, the U.S. Attorney General may transfer the lead federal agency role from the FBI to FEMA.¹¹⁷

Other agencies have significant counter-terrorism roles. EPA, the Department of Health and Human Services and the DOD are all intricately involved.¹¹⁸ For example, EPA's Federal Response Plan, which groups federal assistance into twelve functional areas called Emergency Support Functions, concentrates on the multi-agency disaster response program, helping states during and after a disaster.¹¹⁹ Additionally, EPA helps to ascertain the composition and character of the alleged released substance.¹²⁰

V. OVER-THE-COUNTER AND EASY-TO-OBTAIN CHEMICALS —
A BALANCED APPROACH TO REGULATING
WITHOUT OVER-REACHING

To assist consumers in becoming more informed about methods of "debugging" their homes, EPA issued a "Citizen's Guide to Pest Control and Pesticide Safety" (Guide).¹²¹ This publication is

114. *Id.*; see generally FEMA, Emergency Management Institute, at <http://training.fema.gov/emiweb/> (last visited Dec. 25, 2002) (discussing Federal Emergency Management Agency [hereinafter FEMA] terrorism training programs and resources for emergency managers, elected officials, state, tribal and local government agencies, businesses, schools, hospitals, public and emergency responders).

115. *Id.*; see Exec. Order No. 12,148, 44 C.F.R. 2.1 (1979) (stating that former President Jimmy Carter created FEMA on July 20, 1979).

116. See 42 U.S.C. § 5170 (1999) (noting that, at point of FEMA involvement, FBI remains on scene cooperating with all agencies).

117. *Id.* (noting FEMA responsibility as lead federal agency at conclusion of critical stage).

118. FEMA, *Response and Recovery, Terrorism Incident Annex*, at <http://www.fema.gov/rrr/frp/frpterr.shtm> (last visited Dec. 25, 2002) (discussing federal crisis management response). Terrorism Incident Annex signatory agencies include: Departments of Defense, Energy, Health and Human Services, Justice, FBI, EPA and FEMA. *Id.*

119. See FEMA, *Response and Recovery, Federal Response Plan, ESF No. 10, Hazardous Materials Annex*, at <http://www.fema.gov/rrr/frp/frpesf10.shtm> (last visited Dec. 25, 2002) (discussing EPA's emergency support function when hazardous materials are involved). Under the Federal Response Plan, EPA is the lead agency for hazardous materials. *Id.*

120. See *id.* (discussing Federal Response Plan regarding hazardous materials). In addition, EPA monitors the decontamination and clean-up of the affected site(s). *Id.*

121. EPA, *CITIZEN'S GUIDE TO PEST CONTROL AND PESTICIDE SAFETY* (Sept. 1995), at http://www.epa.gov/oppfead1/Publications/Cit_Guide/citguide.pdf

intended to inform consumers of the risks involved when undertaking their own pest control. FIFRA only provides for the registration of pesticides; it does not guarantee that the ultimate user will be unharmed by use.¹²² The Guide, therefore, presents steps to be taken to control pests safely.¹²³ Such publications, however, could pose a danger if persons lurking in our midst seek more than to eliminate pests.

Effortless availability of pesticides may generate an even greater risk. Who regulates pesticides on store shelves? Can anyone walk into a store and buy one bottle of a potentially lethal chemical and, if so, how about a ton of such a compound? Is society at risk of being poisoned by the unregulated sale of pesticides? Are we assisting illicit users by publishing what appear to be innocuous documents on methodologies of pesticide use?

As previously stated, a CNN-released training video for select Al Qaeda recruits depicted terrorists being taught how to construct bomb components from "easy-to-obtain" materials.¹²⁴ These materials must be regulated in order to significantly reduce, if not eliminate, the threats posed by chemical attacks. Although chemical facilities are addressing their individual potential vulnerabilities,¹²⁵ corner stores still allow for the sale of possible components without inquiry or other security measures.¹²⁶ Certainly the implementation of loose controls does not suggest a panoply of regulations. Instead, a regulatory system similar to those used to regulate other potentially dangerous products should be instituted.

In assessing the best method to upgrade or devise balanced protection for the nation's store shelves, an analysis of other regulatory schemes should be performed. A system analogous to firearm

[hereinafter EPA CITIZEN'S GUIDE] (providing in its foreword that EPA has responsibility of ensuring that pesticides do not pose unreasonable risks to public).

122. *See id.* (instructing citizens on use, handling and safety aspects of pesticides). Pesticides may be sold in the U.S. after being issued a registration number by the EPA. *Id.*

123. *Id.* (recommending procedures before using pesticides, including mixing or applying pesticides; post application procedures; and storage and safe disposal of pesticides).

124. Robertson, *supra* note 11 (showing steps needed to make pure TNT and bomb components from scratch with use of "easy-to-obtain" materials).

125. *See generally* FAQ About Implementing SOCMA's Responsible Care Initiative, at <http://www.socma.com/ResponsibleCare/FAQImplementation.htm> (last visited Sept. 4, 2002) (noting that SOCMA has instituted "responsible care" program (chemical industry's voluntary initiative to promote safe, environmentally responsible and innovative operations)).

126. *See generally* The Home Depot's website, at <http://www.homedepot.com> (last visited Feb. 3, 2003) (advertising turf builder with weed control). Buying a chemical online is but a click away. *Id.*

sale regulation merits exploration. Just as a person cannot walk into a store and purchase a firearm without precautionary requirements, so should a potential pesticide or chemical purchaser undergo similar scrutiny. Although the stringent requirements that accompany gun purchases may be too draconian for household chemical purchases, some regulation is required. The idea however, should not be superfluous; rather, a middle-of-the-road approach would be more appropriate.¹²⁷

In short, a handgun purchaser is required to produce identification and endure waiting periods and background checks.¹²⁸ When purchasing a firearm, one must typically present identification, such as a government-approved photo identification, proof of U.S. citizenship, name, date of birth, gender, race and possibly other relevant information.¹²⁹ In Florida, an instant background check is done through the Florida Department of Law Enforcement.¹³⁰ A handgun, however, requires a three-day wait (post-sale) prior to possession.¹³¹

If measures are taken similar to that of Florida, it would be easier for authorities to identify people trying to purchase over-the-counter pesticides or chemicals. For example, establishing an identity bank is a feasible task that would provide an immediate identity trail if needed by the authorities. Chemicals and pesticides could be purchased at a separate and discrete counter equipped with the necessary technology to establish an identity database. Prospective buyers should be required to show a government-approved photo identification and have their identity information entered and stored. At a minimum, this would provide a blanket of security, albeit a small one, in the identity of the purchasers. Additionally, the purpose for the purchase could be documented and any suspicious amount or type could be reported to authorities. This baseline approach encompasses minimum intrusiveness and provides law enforcement some assistance in maintaining a secure home-

127. See Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (codified in 18 U.S.C. § 925) (discussing federal regulations on purchasing firearms).

128. See 18 U.S.C. § 922(t)(1) (2001) (discussing requirements under Brady Bill). Federal law requires that a background check be conducted before any firearms (long guns and hand guns) can lawfully be transferred on or after Nov. 20, 1998. *Id.*

129. Telephone Interview with Lena Pollack, Special Agent, Alcohol, Tobacco, and Firearms (ATF) Orlando Office (Sept. 4, 2002) (discussing protocol for purchasing of firearm in state of Florida).

130. See *id.* (discussing Florida's background check procedures).

131. See FLA. STAT. ch. 790.0655 (1999) (stating wait requirements for purchasing handgun in Florida).

land. As the threat from “easy-to-obtain” chemicals has been reported,¹³² the nation’s response must not be delayed.

VI. CONCLUSION — ORDINARY SUBSTANCES MUST BE INCLUDED IN ANY HOMELAND SECURITY REGULATORY SCHEME

When used as intended, harm from pesticides is limited.¹³³ In the hands of terrorists, pesticides pose a national threat.¹³⁴ The need for more stringent regulation and oversight is obvious. Not so evident is how to balance oversight against undue infringement; should this balance be of such importance at a time when our nation is under threat of possible attack? Historically, civil liberties have been limited or put aside in favor of preserving America’s national security.¹³⁵ Is the country at a stage where the conflict between civil liberties and compulsory government-imposed restrictions should sway in favor of the former? The legislation or regulation espoused in this article does not compel undue burden or intrusion into individual civil liberties. Requirements such as identification checks and information banks are insignificant when the tradeoff is security, and the sacrifice of liberty is minimal.¹³⁶

One university professor has noted the ease of ordering chemicals by mail in a quantity sufficient to make three hundred grams of the sarin nerve gas.¹³⁷ Such an amount can kill up to 7,500 people

132. See Robertson, *supra* note 11 (reporting ease of obtaining certain chemicals by terrorist groups).

133. See generally EPA CITIZEN’S GUIDE, *supra* note 122 (discussing use and safety of pesticides to general public).

134. See DOT Safety Alert, *supra* note 9 (urging increased safety measures by hazmat community). Included in this safety alert are issues related to safety and security of hazardous materials. See *id.*

135. See Michael F. Dowley, *Government Surveillance Powers Under the USA PATRIOT Act: Is it Possible to Protect National Security and Privacy at the Same Time? A Constitutional Tug-of-War*, 36 SUFFOLK U. L. REV. 165, 166 (2002) (discussing whether expansion of executive authority to engage in expanded electronic surveillance violates Constitution). The restrictions of civil liberties in times of national threat began soon after the birth of the United States when Congress passed the Alien and Sedition Acts in 1798. See *id.* at 174. During the Civil War, civil liberties were again curtailed when President Abraham Lincoln suspended the writ of habeas corpus. See *id.* Additionally, during World War I, the government truncated anti-war speech and cited national security concerns as other fundamental liberties were curtailed. See *id.* at 175.

136. See *id.* at 165 (discussing Patriot Act). The question of whether the cost to civil liberties outweighs the added security that protective legislation provides evokes debate. See *id.* at 166.

137. See Lucy Ament, *Counterterrorism Bill Would Open Up TSCA, PESTICIDE & TOXIC CHEM. NEWS* (Mar. 25, 2002), available at 2002 WL 1162427 (discussing ease of mail ordering toxic chemicals).

in a subway system.¹³⁸ The professor supports requiring background checks and issuing licenses to chemists who purchase chemicals and/or substances that can be used as weaponry.¹³⁹ This article proposes expanding the pool of people being checked. All people, including non-chemists purchasing any type of chemical, should be checked at a level commensurate with the risks to the public. As previously discussed, a simple identity bank linking customers to their purchases would provide an immediate paper trail for authorities. Although much action has seemingly gone into preparing the nation for potential terrorist attacks, work in the legislative arena is required for the nation to effectively respond to exigent circumstances.

September 11th embarked the nation on an unintended, unmapped journey.¹⁴⁰ While America continues to mourn, it must also prepare. Preparation entails both the unknown and the known. Chemical and biological threats are a known.¹⁴¹ Legislators must act without hesitation to combat this genuine threat. In so doing, legislators must be cognizant that all chemicals, common, readily available and restricted are vulnerable. This vulnerability must be minimized to avoid another September 11th.

138. *See id.* (discussing consequences of 300 grams of sarin gas).

139. *See id.* (discussing need for background checks on those who purchase toxic chemicals).

140. Charles Percy, *An Unbidden Journey Has Rekindled the American Spirit*, ST. LOUIS POST-DISPATCH (Sept. 1, 2002), available at <http://www.stltoday.com/stltoday/news/special/91101.nsf/other/AE10684A9F2D020586256C310052B8A9?OpenDocument>.

141. *See generally* CDC Public Health Emergency Preparedness and Response, at <http://www.bt.cdc.gov/Agent/agentlist.asp> (last visited Dec. 20, 2002) (listing biological agents and diseases). The Centers for Disease Control lists all biological diseases broken down by categories, as well as a list of chemical agents. *Id.*